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SB 336 - Law Enforcement Officers and Agencies

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LAW ENFORCEMENT OFFICERS AND AGENCIES

Georgia Bureau of Investigation: Amend Chapter 3 of Title 35 of the Official Code of Georgia Annotated, Relating to the Georgia Bureau of Investigation, so as to Prevent the Disclosure of a Subpoena Issued for Production of Electronic Communication Service Records for Computer or Electronic Devices that Are Used in Furtherance of Certain Offenses against Minors or Involving Trafficking of Persons for Labor or Sexual Servitude, to the Subscriber or Customer; Allow the Georgia Crime Information Center to Retain Fingerprints of Certain Individuals under Certain Circumstances and Submit such Fingerprints to the Federal Bureau of Investigation; Provide for an Exchange of Information to Certain Entities; Provide for Removal of Fingerprints under Certain Circumstances; Provide for Fees; Amend Titles 20, 31, 37, and 49 of the Official Code of Georgia Annotated, Relating to Education, Health, Mental Health, and Social Services, Respectively, so as to Allow the Georgia Bureau of Investigation and, as Authorized, the Federal Bureau of Investigation to Retain Fingerprints when an Agency or Entity Is Participating in the Bureau's Program; Provide for Related Matters; Repeal Conflicting Laws; And for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 20-1A-31, -32, -34, -38, -39 (amended); 31-2-9 (amended); 31-2A-7 (amended); 31-7-254 (amended); 31-7-258 (amended); 31-7-259 (amended); 35-3-4.1 (amended); 35-3-4.3 (amended); 35-3-33 (amended); 37-1-28 (amended); 49-2-14.1 (amended); 49-2-14 (amended); 49-5-62–64 (amended); 49-5-63, -64, -68–69.1 (amended); 49-5-111 (amended)
BILL NUMBER:	SB 336
ACT NUMBER:	411
GEORGIA LAWS:	2018 Ga. Laws 507
SUMMARY:	The Act prohibits data carriers from disclosing to their customers the

existence of a subpoena issued for the production of the customers' records. The Act also allows the Georgia Bureau of Investigation to retain the fingerprints of individuals working in certain professions that require background checks for the duration of employment.

EFFECTIVE DATE: July 1, 2018; O.C.G.A. § 20-1A-39, January 1, 2019

History

Georgia Senate Bill (SB) 336 consists of two distinct legislative efforts. The original SB 336 prohibits data carriers from informing their customers of the existence of subpoenas seeking to obtain customers' records. Georgia House of Representatives Bill (HB) 623, which was added to SB 336 by substitute, allows the Georgia Bureau of Investigation (GBI) to retain fingerprints collected during occupational licensing background checks in limited circumstances. This Peach Sheet evaluates each of these two sections separately.

HB 623

In 2012, Christina Hawkins assumed ownership of the Progressive Christian Academy in Macon, Georgia.¹ Although Hawkins underwent a background check when she assumed ownership, officials later discovered that she had prior convictions for fraud, theft, possession of drug paraphernalia, and additional crimes.² How could her numerous convictions have gone unnoticed? A state background check that Hawkins passed in Georgia failed to detect those prior convictions because they occurred in Florida.³

1. Michael Klazema, *Georgia Now Requires National Background Checks for Child Care Workers*, BACKGROUNDCHECKS.COM (May 3, 2013), <https://www.backgroundchecks.com/community/post=3984> [https://perma.cc/E27X-3MUY].

2. Allie Kuester, *Woman Who Inspired Georgia Educator Background Check Law Arrested in Florida*, MIND YOUR BUSINESS, INC. (Sept. 5, 2014), <https://www.mybinc.com/blog/woman-inspired-georgia-educator-background-check-law-arrested-florida/> [https://perma.cc/C55Y-QX7L].

3. Klazema, *supra* note 1.

Additionally, her convictions were under an alias, “Christina Perera.”⁴ In response to stories like this, the Georgia legislature passed a law requiring all childcare workers to pass national fingerprinting background checks.⁵ Although these extensive fingerprinting background checks cost more than the comparatively limited state background checks, the bill’s sponsor urged, “[i]t’s all about the safety of the children.”⁶

Georgia law requires fingerprint background checks for various occupations involving work with children, patients, or the elderly.⁷ The Georgia Department of Early Care and Learning (DECAL), the Georgia Department of Human Services (DHS), the Georgia Department of Community Health (DCH), and the Georgia Department of Behavioral Health and Developmental Disabilities (DBHDD) each require fingerprint background checks.⁸ However, felons can still end up working in facilities caring for the most vulnerable of our population even with federal background check requirements. For example, Georgia law required childcare institutions under the DHS to administer fingerprint background checks every five years.⁹ Thus, an employee working in such a facility could be convicted of a felony after the background check and continue to work there undetected until the next required background check. However, as a practical matter, continual fingerprint checks impose additional costs on employers and inconvenience for employees undergoing the background checks.

To address the need for real-time protection of Georgia’s children and elderly, HB 623—as it appears in SB 336—authorizes the GBI and Federal Bureau of Investigation (FBI) to retain fingerprints submitted for these national background checks.¹⁰ Thus, Georgia

4. *Id.*

5. Nancy Badertscher, *Deeper Checks on Child-Care Workers Coming*, ATLANTA J.-CONST. (Dec. 8, 2013, 10:25 PM), <https://www.myajc.com/news/state—regional/deeper-checks-child-care-workers-coming/uZGFXgM99rTyYZAmEHn9EK/> [<https://perma.cc/SL9W-JUP5>].

6. *Id.*

7. *See, e.g.*, O.C.G.A. §§ 20-1A-31, 31-2-9 (2018).

8. O.C.G.A. §§ 20-1A-39, 49-2-14, 31-2-9, 37-1-28 (2018).

9. Video Recordings of Non-Civil Judiciary Committee Meeting at 38 min., 6 sec. (Mar. 12, 2018) (remarks by Rep. Andrew Welch (R-110th)), <https://livestream.com/accounts/19771755/events/7993559/videos/171466762> [<https://perma.cc/ULW2-HMZG>] [hereinafter Non-Civil Judiciary Video].

10. *See id.* at 48 min., 59 sec. (remarks by Rep. Ed Setzler (R-35th)); *see also* HB 623 (HCS), 2018 Ga. Gen. Assemb.

officials could be notified instantly if a childcare worker has been charged with a felony anywhere in the United States.¹¹ Additionally, retention of fingerprint data could obviate the need for continual retesting.

The Underlying SB 336

In September 2009, the GBI's Internet Crimes Against Children Task Force detected an IP address from Rome, Georgia, sharing suspected child pornography.¹² A GBI agent subsequently obtained a subpoena from Comcast, the Internet provider for the IP address.¹³ In response to the subpoena, Comcast revealed that the IP address belonged to Charles Ralph Henderson.¹⁴ The GBI then obtained a search warrant and confiscated Henderson's computer.¹⁵ The evidence stored on the computer led to Henderson's conviction on four counts of sexual exploitation of children.¹⁶

Subpoenas directed to Internet providers, like Comcast, have led to numerous charges of child pornography and other computer crimes.¹⁷ Internet providers receiving subpoenas are often urged not to notify their customers who are being targeted by law enforcement.¹⁸ Otherwise, customers aware of pending criminal investigations against them might delete the evidence necessary to sustain a conviction.¹⁹ In one copyright infringement case, for instance, Comcast informed its customer of the lawsuit against him and warned the customer that Comcast intended to reveal his identity in response to a subpoena.²⁰ The customer subsequently wiped his hard

11. See Non-Civil Judiciary Video, *supra* note 9, at 49 min., 9 sec. (remarks by Rep. Ed Setzler (R-35th)).

12. Henderson v. State, 320 Ga. App. 553, 554, 740 S.E.2d 280, 284 (Ga. Ct. App. 2013).

13. *Id.*, 740 S.E.2d at 284.

14. *Id.*, 740 S.E.2d at 284.

15. *Id.*, 740 S.E.2d at 284.

16. *Id.*, 740 S.E.2d at 284.

17. See, e.g., United States v. Ortega, No. CR415-134, 2015 U.S. Dist. LEXIS 147638 at *2 (S.D. Ga. 2015); Courtney v. State, 340 Ga. App. 496, 496, 797 S.E.2d 496, 496 (Ga. Ct. App. 2017).

18. Michael Levenson, *Power to Seize Phone, Net Records Is a 'Sanctioned Fishing Expedition,' Critics Say*, BOS. GLOBE (July 16, 2017), <https://www.bostonglobe.com/metro/2017/07/16/concerns-raised-over-prosecutors-power-seize-phone-internet-records/JKdVWqjFNUSMkaboOoAhZK/story.html> [https://perma.cc/LWH8-Z26D].

19. *Id.*

20. Paramount Pictures Corp. v. Davis, No. 05-0316, 2006 U.S. Dist. LEXIS 50955, at *4-5 (E.D.

drive clean before forensic examiners could confiscate it.²¹ Although the language in such subpoenas requests that Internet providers refrain from notifying users of the subpoena, some Internet providers will always warn subscribers unless they are legally compelled to keep quiet.²²

In response, legislators have sought to prevent Internet providers from warning subscribers of the existence of a subpoena against them. For example, the federally proposed Targeting Child Predators Act would amend 18 U.S.C. § 3486 to require Internet providers to wait 180 days before notifying subscribers of subpoenas requesting their personal information for child exploitation investigations.²³ Other states have prohibited Internet providers from notifying customers of subpoenas against them, regardless of the type of investigation,²⁴ and SB 336 contains the same prohibitions.

Bill Tracking

Consideration and Passage by the Senate

Senators Renee Unterman (R-45th), Butch Miller (R-49th), Gloria Butler (D-55th), and Joshua McKoon (R-29th) sponsored SB 336 in the Georgia Senate.²⁵ The bill was read for the first time in the Senate on January 22, 2018, and was committed to the Senate Committee on

Pa. July 26, 2006).

21. *Id.* at *8.

22. Aaron Sankin, *Meet Sonic, the Anti-Comcast*, DAILY DOT (Apr. 7, 2015, 9:07 AM), <https://www.dailydot.com/layer8/sonic-isp-privacy/> [<https://perma.cc/XZH5-3QBW>].

23. *House Committee Passes DeSantis Bill Targeting Child Predators*, STATES NEWS SERVICE (Mar. 22, 2017), <https://desantis.house.gov/2017/3/house-committee-passes-desantis-bill-targeting-child-predators> (on file with the Georgia State University Law Review).

24. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3016 (2018) (allowing an agency to apply for a court order directing Internet provider “not to notify any other person of the existence of the subpoena, court order or warrant for such period as the court deems appropriate”); FLA. STAT. ANN. § 934.24 (West 2018) (requiring Internet provider in certain circumstances to create backup copy of communications “[w]ithout notifying the subscriber”); 725 ILL. COMP. STAT. 5/115-17b (2018) (allowing court to prohibit disclosure of subpoena for up to ninety days in certain circumstances); VT. STAT. ANN. tit. 13, § 8103 (West 2018) (permitting delay of up to ninety days of required customer notification in “emergency” circumstances); W. VA. CODE § 62-1G-2(e) (2018) (“The electronic communications system or service . . . shall not disclose the existence of the subpoena or its response to the subpoena to the account holder identified in the subpoena.”).

25. Georgia General Assembly, SB 336, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/SB/336> [<https://perma.cc/F6FH-XF78>] [hereinafter SB 336 Bill Tracking].

Judiciary.²⁶ On February 8, 2018, the Committee amended the bill in part and favorably reported it by Committee substitute.²⁷

The Committee substitute included most of the introduced bill's text, but a few subsections were slightly changed.²⁸ The Committee updated the title to reflect the bill's purpose more directly without making any material change to its content.²⁹ Further, the Committee also changed the text of two subsections to include internal references in the proposed statutory text. For example, Section 2—which sought to amend Code section 35-3-4.3(b)—now reads “the subpoena issued pursuant to subsection (a) of this Code section,”³⁰ instead of simply stating “the subpoena for production.”³¹ The Committee made no substantive changes.³²

The Senate read the bill for the second time on February 12, 2018, and for the third time on February 28, 2018.³³ No floor amendments were offered. The Senate passed the Committee substitute as amended on February 28, 2018, by a unanimous vote of 50 to 0.³⁴

Consideration and Passage by the House

Representative Andrew Welch (R-110th) sponsored SB 336 in the Georgia House of Representatives.³⁵ The House read the bill for the first time on March 1, 2018, and committed it to the House Judiciary Non-Civil Committee.³⁶ The bill was read in the House for the second time on March 5, 2018.³⁷ On March 12, 2018, the Judiciary

26. State of Georgia Final Composite Status Sheet, SB 336, Jan. 22, 2018.

27. *Id.*

28. Compare SB 336, as introduced, 2018 Ga. Gen. Assemb., with SB 336 (SCS), 2018 Ga. Gen. Assemb.

29. Compare SB 336 (SCS), Title, p. 1, ll. 1–7, 2018 Ga. Gen. Assemb., with SB 336, as introduced, Title, p. 1, ll. 1–7, 2018 Ga. Gen. Assemb.

30. SB 336 (SCS), § 2, p. 2, l. 56, 2018 Ga. Gen. Assemb.

31. SB 336, as introduced, § 2, p. 2, l. 49, 2018 Ga. Gen. Assemb.

32. Compare SB 336, as introduced, 2018 Ga. Gen. Assemb., with SB 336 (SCS), 2018 Ga. Gen. Assemb.

33. State of Georgia Final Composite Status Sheet, SB 336, Feb. 28, 2018.

34. *Id.*; Georgia Senate Voting Record, SB 336, Vote #533 (Feb. 28, 2018).

35. SB 336 Bill Tracking, *supra* note 25.

36. State of Georgia Final Composite Status Sheet, SB 336, Mar. 1, 2018.

37. *Id.*

Non-Civil Committee amended the bill in part and favorably reported the bill by substitute.³⁸

The Committee added HB 623, then pending in the House, to SB 336 by substitute, making significant changes to the length and substance of SB 336. Specifically, these changes took SB 336's two former sections and added twenty-two subsections and a completely revised third section.³⁹ These changes were all directed at allowing the Georgia Crime Information Center to retain fingerprints of individuals who were going through background checks for an employer or agency that participated in the GBI's fingerprinting program, which was the content of HB 623.⁴⁰ The Committee changed the title of SB 336 to reflect these substantive changes.⁴¹

The Committee's proposed change to SB 336 required updating several sections of Georgia's Code. Section 1A-1 added a paragraph, (a)(1)(F) to Code section 35-3-33, which would allow the Georgia Crime Information Center to "[o]btain and file fingerprints, descriptions, photographs, and any other pertinent identifying data on persons who"⁴² may be fingerprinted for background checks under Georgia or federal law.⁴³ Such fingerprints are to be kept "separately from records relating to the identification of criminals."⁴⁴

38. *Id.*

39. *Compare* SB 336, as passed Senate, 2018 Ga. Gen. Assemb., *with* SB 336 (HCS), 2018 Ga. Gen. Assemb.

40. SB 336 (HCS), Title, p. 1, ll. 5–14, 2018 Ga. Gen. Assemb. (amended to now read that SB 336 will "allow the Georgia Crime Information Center to retain fingerprints of certain individuals under certain circumstances"); *see* Non-Civil Judiciary Video, *supra* note 9; *id.* at 47 min., 30 sec. (remarks by Rep. Ed Setzler (R-35th)); *see also* HB 623 (HCS) 2017 Ga. Gen. Assemb.

41. SB 336 (HCS), Title, p. 1, ll. 5–14, 2018 Ga. Gen. Assemb. The Committee's version of the title read that SB 336 was intended to do the following:

[T]o allow the Georgia Crime Information Center to retain fingerprints of certain individuals under certain circumstances and submit such fingerprints to the Federal Bureau of Investigation; to provide for an exchange of information to certain entities; to provide for removal of fingerprints under certain circumstances; to provide for fees; to amend Titles 20, 31, 37, and 49 of the Official Code of Georgia Annotated, relating to education, health, mental health, and social services, respectively, so as to allow the Georgia Bureau of Investigation and, as authorized, the Federal Bureau of Investigation to retain fingerprints when an agency or entity is participating in the bureau's program.

Id.

42. O.C.G.A. § 35-3-33 (2018).

43. SB 336 (HCS), § 1A-1, p. 3, ll. 68–80, 2018 Ga. Gen. Assemb. (making a change to the law that exempts fingerprints submitted to obtain or renew a weapons carry license).

44. *Id.* § 1A-1, p. 3, ll. 77–78.

The Committee's new Section 1A-2 further amended Code section 35-3-33 to allow the fingerprints obtained under the new paragraph to be submitted to the FBI if requested; require that fingerprints obtained under the new paragraph be removed within ten days of notification that the individual is no longer employed by or otherwise affiliated with the requesting entity or when the entity is no longer participating in the program; and allow the GBI to charge an annual fee of up to \$500 to any non-state entity "that desires to participate in the [fingerprinting] program."⁴⁵

The Committee also added subsections that amended the Georgia Code to adapt to this new change to the GBI fingerprinting program. The first of these subsections sought to change Code section 20-1A-31.⁴⁶ In addition to non-substantive grammatical changes, the Committee added that the "time frames set forth in this subsection shall not apply when fingerprints have been retained by the department due to its participation in the [fingerprinting] program."⁴⁷ Similarly, in addition to comparable non-substantive grammatical changes, this same time frame language was proposed to be added to Code sections 20-1A-32, 20-1A-38, 20-1A-39, 31-7-258, 49-5-62, 49-5-68, and 49-5-69.1.⁴⁸

The Committee further changed several Code sections to indicate that if the relevant department was participating in the fingerprint program, the GBI and FBI "shall be authorized to retain fingerprints obtained" under the program "and the department shall notify the individual whose fingerprints were taken of the parameters of such retention."⁴⁹ This notification language was proposed to be added to Code sections 20-1A-34, 31-2-9, 35-3-33, 31-7-254, 31-7-259, 37-1-28, 49-2-14, 49-2-14.1, 49-5-62, 49-5-64, 49-5-69.1, and 49-5-111.⁵⁰

45. *Id.* § 1A-2, pp. 3–4, ll. 82–101.

46. *Id.* § 2-1, pp. 4–5, ll. 104–06.

47. *Id.* § 2-1, pp. 4–5, ll. 144–46.

48. *Id.* § 2-2, pp. 5–6, ll. 161–66; SB 336 (HCS), § 2-4, pp. 6–7, ll. 197–98, 212–14, 2018 Ga. Gen. Assemb.; *id.* § 2-5, pp. 7–8, ll. 216–18, 255–58; *id.* § 2-9, pp. 10–11, ll. 313–15, 330–32, 358–61; *id.* § 2-14, pp. 12–13, ll. 401–03, 426–28; *id.* § 2-17, pp. 14, ll. 478–82; *id.* § 2-18, pp. 15, ll. 484–86, 491–93.

49. *See, e.g.*, SB 336 (HCS), § 2-3, p. 6, ll. 191–95, 2018 Ga. Gen. Assemb.

50. *Id.*; *id.* § 2-6, p. 9, ll. 274–82; *id.* § 2-7, p. 9, ll. 284–91; *id.* § 2-8, pp. 9–10, ll. 293–95, 307–11; *id.* § 2-10, p. 11, ll. 368–72; SB 336 (HCS), § 2-11, pp. 11–12, ll. 374–81, 2018 Ga. Gen. Assemb.; *id.* § 2-12, p. 12, ll. 383–90; *id.* § 2-13, p. 12, ll. 392–99; *id.* § 2-14, pp. 12–13, ll. 401–03,

Finally, the Committee's revised version amended Code section 49-5-63 to adapt it to the new fingerprinting program, changing the section to read that any employee other than a director "who receives a preliminary records check determination that is satisfactory shall not be required to obtain a fingerprint records check when fingerprints have been retained by the department due to its participation in the program."⁵¹

SB 336 was read for the third time in the House on March 19, 2018.⁵² The House passed the Committee substitute of SB 336 on March 19, 2018, by a majority vote of 113 to 59.⁵³

The Senate agreed to the House substitute on March 29, 2018, by a vote of 46 to 0.⁵⁴ The House then sent the bill to Governor Nathan Deal (R) on April 5, 2018.⁵⁵ Governor Deal signed the bill into law on May 6, 2018, and the bill became effective on July 1, 2018.⁵⁶

The Act

Part I

Part I of the Act amends Code section 35-3-4.1, relating to subpoenas to produce electronic communication service records for computers or electronic devices used in furtherance of certain offenses against minors, and Code section 35-3-4.3, relating to the subpoena power for investigations of violations involving trafficking of persons for labor or sexual servitude.⁵⁷ The legislature amended these Code sections to provide greater protection for victims of sexual abuse by preventing communication carriers from notifying subscribers suspected of such crimes of subpoenas issued against them.⁵⁸ Otherwise, suspects notified of such subpoenas could thwart

422–26; *id.* § 2-16, p. 14, ll. 459–60, 472–76; *id.* § 2-18, p. 15, ll. 484–91; SB 336 (HCS), § 2-19, p. 15, ll. 495–500, 2018 Ga. Gen. Assemb. (referring only to the GBI and not the FBI).

51. *Id.* § 2-15, p. 14, ll. 452–55.

52. State of Georgia Final Composite Status Sheet, SB 336, Mar. 19, 2018.

53. *Id.*; Georgia House of Representatives Voting Record, SB 336, #728 (Mar. 19, 2018).

54. Georgia Senate Voting Record, SB 336, Vote #782 (Mar. 29, 2018).

55. State of Georgia Final Composite Status Sheet, SB 336, Apr. 5, 2018.

56. *See, e.g.*, O.C.G.A. § 35-3-33 (2018).

57. 2018 Ga. Laws 507, § 1-1, at 508–09.

58. Video Recordings of Senate Meeting at 1 hr., 59 min., 43 sec. (Feb. 28, 2018) (remarks by Sen. Renee Unterman (R-45th)), https://www.youtube.com/watch?time_continue=10&v=6qxmnnlOFls

investigators by simply deleting incriminating material from their computers.⁵⁹

Section 1-1 adds subsection (a)(3) to Code section 35-3-4.1, providing that “[a] provider of electronic communication service or remote computing service shall not provide notification of the subpoena issued pursuant to paragraph (1) of this subsection to the subscriber or customer of such service.”⁶⁰ Section 1-2 adds similar language to Code section 35-3-4.3 as new subsection (b), relabeling the previous subsection (b) as subsection (c).⁶¹

Part IA

Part IA of the Act amends Code section 35-3-33, relating to the powers and duties of the Georgia Crime Information Center (the Center).⁶² The purpose of Part IA is to allow the Center to retain and submit to the FBI fingerprints for individuals subject to fingerprint based criminal history checks by either Georgia or federal law for employment or licensing purposes.⁶³ This practice is known as the Retained Applicant Fingerprint Background Check program or the “Rapback” program.⁶⁴

Section 1A-1 adds subsection (a)(1)(F) to Code section 35-3-33, creating an additional class of people for which the Center may obtain and file fingerprints.⁶⁵ Specifically, the Center may now collect fingerprints for employees subject to fingerprint background checks.⁶⁶ However, the fingerprints collected under the Rapback program must be retained in a secure location separate from the

[<https://perma.cc/P5WW-CVD4>].

59. *Id.*

60. 2018 Ga. Laws 507, § 1-1, at 508.

61. 2018 Ga. Laws 507, § 1-2, at 508.

62. 2018 Ga. Laws 507, § 1A-1, at 508–09.

63. Video Recordings of Non-Civil Judiciary Committee Meeting, at 3 min., 5 sec. (Feb. 26, 2018) (remarks by Rep. Andrew Welch (R-110th)), <https://livestream.com/accounts/19771755/events/7993559/videos/170754965> [<https://perma.cc/B9KN-B8CP>].

64. *Next Generation Identification (NGI)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi> [<https://perma.cc/E9MS-XDGD>] (last visited Sept. 17, 2018); *Rapback*, OHIO DEP’T OF DEVELOPMENTAL DISABILITIES, <http://dodd.ohio.gov/CountyBoards/Resources/Pages/Rapback.aspx> [<https://perma.cc/Q2GZ-5GSK>] (last visited September 17, 2018) (providing origin of “Rapback” abbreviation).

65. 2018 Ga. Laws 507, § 1A-1, at 509.

66. O.C.G.A. § 35-3-33(a)(1)(F) (2018)

fingerprints collected under the criminal system.⁶⁷ Further, the Center may not retain fingerprints submitted for obtaining a weapons carry license.⁶⁸

Section 1A-2 adds subsections (a)(18)–(20) to Code section 35-3-33.⁶⁹ These subsections clarify the Center’s responsibilities in implementing the Rapback program.⁷⁰ The Center must now submit fingerprints collected under the program to the FBI.⁷¹ The Center must also remove a person’s fingerprints collected under the program within ten days after it receives notice that the person no longer works for a participating organization, or when an organization decides to no longer participate in the program.⁷² The Center must inform the FBI when it deletes the fingerprints under these circumstances.⁷³ Finally, the Center may collect an annual subscriber fee of up to \$500.00 for any non-state agency participating in the program.⁷⁴

Part II

Although prior versions provided a much more expansive implementation of the new fingerprint check program, the Act focuses only on DECAL, DHS, DCH, and DBHDD.⁷⁵ Section 2 of the Act amends statutes governing fingerprint background checks for these agencies. Broadly, the amendments introduce notification and retention requirements and provide that repeated fingerprint collections are not necessary for participants in the new fingerprint collection program.

Section 2-1 amends Code section 20-1A-31, relating to records check applications for potential employees and fingerprint records checks.⁷⁶ First, the Act amends subsection (a) by specifying that the time frames described in that subsection do not apply when

67. *Id.*

68. *Id.*

69. 2018 Ga. Laws 507, § 1A-2, at 509–10.

70. *Id.*

71. O.C.G.A. § 35-3-33(a)(18) (2018).

72. O.C.G.A. § 35-3-33(a)(19) (2018).

73. *Id.*

74. O.C.G.A. § 35-3-33(a)(20) (2018).

75. Non-Civil Judiciary Video, *supra* note 9.

76. 2018 Ga. Laws 507, § 2-1, at 510–11.

fingerprints have been retained under the Rapback program.⁷⁷ Additionally, the Act amends subsection (b) by clarifying that employees do not need to have their fingerprints checked every five years if their fingerprints have been retained under the Rapback program.⁷⁸ Additionally, the Act includes non-substantive grammar changes throughout this Code section.⁷⁹

Section 2-2 amends Code section 20-1A-32, relating to program license or commission applicants, records check requirements, and change of ownership.⁸⁰ The Act adds subsection (d), which specifies that the time frames described in that Code section do not apply when fingerprints have been retained under the Rapback program.⁸¹

Section 2-3 amends Code section 20-1A-34, relating to fingerprint checks on the national level, satisfactory determination prior to employment, and additional records checks.⁸² The Act amends subsection (b) by clarifying that employees do not need to have their fingerprints checked every five years if their fingerprints have been retained under the Rapback program.⁸³ The Act also adds subsection (c), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.⁸⁴ The department must now notify the person whose fingerprints were taken of the parameters of such retention.⁸⁵ Finally, the Act includes non-substantive grammar changes throughout this Code section.⁸⁶

Section 2-4 amends Code section 20-1A-38, relating to change of directors and records check requirements.⁸⁷ The Act amends subsection (a) by specifying that the time frames described in subsection (a) do not apply when fingerprints have been retained

77. *Id.* at 511.

78. *Id.*

79. *Id.* at 510–11.

80. 2018 Ga. Laws 507, § 2-2, at 511.

81. *Id.*

82. 2018 Ga. Laws 507, § 2-3, at 511–12.

83. *Id.* at 512.

84. *Id.*

85. O.C.G.A. § 20-1A-34(c) (2018).

86. 2018 Ga. Laws 507, § 2-3, at 511–12.

87. 2018 Ga. Laws 507, § 2-4, at 512–13.

under the Rapback program.⁸⁸ The Act also includes non-substantive syntax changes.⁸⁹

Section 2-5 amends Code section 20-1A-39, relating to potential employees, current employees and directors, and records check requirements.⁹⁰ The Act amends subsection (a) by specifying that the time frames described in that subsection do not apply when fingerprints have been retained under the Rapback program.⁹¹ The Act also amends subsection (c) by clarifying that employees do not need to have their fingerprints checked every five years if their fingerprints have been retained under the Rapback program.⁹² Additionally, the Act includes non-substantive grammar changes throughout this Code section.⁹³

Section 2-6 amends Code section 31-2-9, relating to records check requirements for certain health care facilities.⁹⁴ The Act adds subsection (g), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.⁹⁵ Subsection (g) also requires the department to notify the person whose fingerprints were taken of the parameters of such retention.⁹⁶

Section 2-7 amends Code section 31-2A-7, relating to “conviction data,” to authorize departments to receive data from law enforcement relevant to employment decisions and criminal history information.⁹⁷ The Act adds subsection (h), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.⁹⁸ Subsection (h) also requires the department to notify the person whose fingerprints were taken of the parameters of such retention.⁹⁹

88. *Id.*

89. *Id.*

90. 2018 Ga. Laws 507, § 2-5, at 513–14.

91. *Id.* at 514.

92. *Id.*

93. 2018 Ga. Laws 507, § 2-5, at 513–14.

94. 2018 Ga. Laws 507, § 2-6, at 514.

95. *Id.*

96. *Id.*

97. 2018 Ga. Laws 507, § 2-7, at 514.

98. *Id.*

99. *Id.*

Section 2-8 amends Code section 31-7-254, relating to the transmission of the director's fingerprints to the Georgia Crime Information Center for review and notification to the department of its findings.¹⁰⁰ The GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹⁰¹ The department must also notify the person whose fingerprints were taken of the retention.¹⁰²

Section 2-9 amends Code section 31-7-258, relating to the change of facility director, notification to department, and effect of department determination.¹⁰³ The Act amends subsections (a) and (c) by specifying that the time frames described in those subsections do not apply when fingerprints have been retained under the Rapback program.¹⁰⁴ Additionally, the Act includes non-substantive grammar changes throughout this Code section.¹⁰⁵

Section 2-10 amends Code section 31-7-259, relating to preliminary records check determinations.¹⁰⁶ The GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹⁰⁷ The department must also notify the person whose fingerprints were taken of the parameters of such retention.¹⁰⁸

Section 2-11 amends Code section 37-1-28, relating to conviction data.¹⁰⁹ The Act adds subsection (g), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹¹⁰ The department must also notify the person whose fingerprints were taken of the parameters of such retention.¹¹¹

Section 2-12 amends Code section 49-2-14, relating to record searches for conviction data on prospective employees.¹¹² The Act

100. 2018 Ga. Laws 507, § 2-8, at 515.

101. O.C.G.A. § 31-7-254 (2018).

102. *Id.*

103. 2018 Ga. Laws 507, § 2-9, at 515–16.

104. *Id.*

105. *Id.*

106. 2018 Ga. Laws 507, § 2-10, at 516–17.

107. O.C.G.A. § 31-7-259(n) (2018).

108. *Id.*

109. 2018 Ga. Laws 507, § 2-11, at 517.

110. *Id.*

111. O.C.G.A. § 37-1-28(g) (2018).

112. 2018 Ga. Laws 507, § 2-12, at 517.

adds subsection (i), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹¹³ Subsection (i) also requires the department to notify the person whose fingerprints were taken of the parameters of such retention.¹¹⁴

Section 2-13 amends Code section 49-2-14.1, relating to definitions and records check requirements for licensing certain facilities.¹¹⁵ The Act adds subsection (g), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹¹⁶ Subsection (g) also requires the department to notify the person whose fingerprints were taken of the parameters of such retention.¹¹⁷

Section 2-14 amends Code section 49-5-62, relating to records check applications for directors of new facilities and preliminary records checks for employees.¹¹⁸ The Act adds subsection (b), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹¹⁹ Subsection (b) also requires the department to notify the person whose fingerprints were taken of the retention.¹²⁰ Furthermore, subsection (b) specifies that the time frames described do not apply when fingerprints have been retained under the Rapback program.¹²¹ The Act also includes non-substantive grammar changes throughout this Code section.¹²²

Section 2-15 amends Code section 49-5-63, relating to notice of determination, issue of license, and effect of unsatisfactory determination.¹²³ The amendment specifies that any employee other than the director who receives a satisfactory records check does not need to obtain a fingerprint records check if that employee's fingerprints have been retained by the department under the Rapback

113. *Id.*

114. *Id.*

115. 2018 Ga. Laws 507, § 2-13, at 517.

116. *Id.*

117. *Id.*

118. 2018 Ga. Laws 507, § 2-14, at 517–18.

119. *Id.* at 518.

120. *Id.*

121. *Id.*

122. 2018 Ga. Laws 507, § 2-14, at 517–18.

123. 2018 Ga. Laws 507, § 2-15, at 518–19.

program.¹²⁴ The amendment also includes non-substantive grammar changes throughout this Code section.¹²⁵

Section 2-16 amends Code section 49-5-64, relating to fingerprint records checks.¹²⁶ The Act retains subsection (a) and adds subsection (b), which states that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹²⁷ Subsection (b) also requires the department to notify the person whose fingerprints were taken of the retention.¹²⁸

Section 2-17 amends Code section 49-5-68, relating to change of director.¹²⁹ The Act adds subsection (d), which specifies that the time frames described in this Code section do not apply when the fingerprints have been retained under the Rapback program.¹³⁰

Section 2-18 amends Code section 49-5-69.1, relating to fingerprint and preliminary records checks for foster homes, notice of results, violations, and foster parents known to have criminal records.¹³¹ The Act adds subsection (f), which specifies that the time frames described in this Code section do not apply when fingerprints have been retained under the Rapback program.¹³² The GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating organization.¹³³ Further, the department must notify the person whose fingerprints were taken of the parameters of such retention.¹³⁴

Section 2-19 amends Code section 49-5-111, relating to employers authorized to make records checks.¹³⁵ The Act revises subsection (c) by providing that the GBI and FBI may retain fingerprints obtained through the Rapback program if the department is a participating

124. *Id.* at 519.

125. *Id.* at 518–19.

126. 2018 Ga. Laws 507, § 2-16, at 519.

127. *Id.*

128. *Id.*

129. 2018 Ga. Laws 507, § 217, at 519.

130. *Id.*

131. 2018 Ga. Laws 507, § 2-18, at 519–20.

132. *Id.* at 520.

133. O.C.G.A. § 49-5-69.1(f) (2018).

134. *Id.*

135. 2018 Ga. Laws 507, § 2-19, at 520.

organization.¹³⁶ The amendment also requires the department to notify the person whose fingerprints were taken of the retention.¹³⁷

Analysis

Strengthening Law Enforcement

The original form of SB 336 sought to prohibit Internet providers from notifying customers of subpoenas against them. Such a prohibition allows law enforcement to access the data authorized under the subpoena before the user would have a chance to know of the subpoena. Prior to the passage of SB 336, an Internet service provider was able to, at its discretion, inform customers of a subpoena against them, although law enforcement could urge the service provider not to do so.¹³⁸ If informed of a subpoena against them, the customers could have erased, removed, or otherwise destroyed the data sought by law enforcement in an effort to escape conviction.¹³⁹ As the law stands today, these customers will not know of the subpoena seeking their data before law enforcement has the chance to act on it. Fundamentally, such a law strengthens law enforcement's power at the expense of suspects having knowledge of subpoenas against them.

The law is a reflection of a government seeking to shore up the power of law enforcement against a rising wave of technology that is increasingly more difficult to track. Georgia is certainly not the first state to pass such a law; many states have taken this step or similar ones in recent years, including Florida, Vermont, Illinois, and West Virginia.¹⁴⁰ Federal law enforcement is also struggling with how to

136. *Id.*

137. *Id.*

138. Levenson, *supra* note 18.

139. See, e.g., *Paramount Pictures Corp. v. Davis*, No. 05-0316, 2006 U.S. Dist. LEXIS 50955, at *4–5 (E.D. Pa. July 26, 2006).

140. FLA. STAT. ANN. § 934.24 (West 2018) (requiring Internet provider in certain circumstances to create backup copy of communications “[w]ithout notifying the subscriber”); 725 ILL. COMP. STAT. ANN. 5/115-17b (West 2018) (allowing court to prohibit disclosure of subpoena for up to ninety days in certain circumstances); VT. STAT. ANN. tit. 13 § 8103 (West 2018) (permitting delay of up to ninety days of required customer notification in “emergency” circumstances); W. VA. CODE ANN. § 62-1G-2(e) (West 2018) (“The electronic communications system or service . . . shall not disclose the existence of the subpoena or its response to the subpoena to the account holder identified in the subpoena.”).

handle increasingly elusive data and tech companies, which will cooperate with law enforcement only if legally compelled to do so.¹⁴¹ Thus, the introduction of SB 336 exemplifies Georgia's interest in supporting law enforcement against new technology by choosing to give law enforcement more tools to fight against disappearing data.

However, SB 336, in its final form, was more than just an attempt to stop Internet service providers from informing their customers of subpoenas against them. SB 336 went through substantial changes in the House, where the Judiciary Non-Civil Committee added the substance of HB 623, then pending in the House, to SB 336 by Committee substitute.¹⁴² These changes sought to allow the Georgia Crime Information Center to retain fingerprints of individuals who were going through background checks for an employer or agency who participated in the GBI's fingerprinting program.

SB 336, before passage, became a bipartite bill; it would prohibit Internet service providers from notifying customers of subpoenas against them and would also give the Georgia Crime Information Center more power by allowing it to retain certain individuals' fingerprints. Both portions of SB 336 thus serve to increase the power of law enforcement, reflecting a commitment by the Georgia legislature to better equip state law enforcement.

141. Most technology companies, particularly those in Silicon Valley, now publicly state their disinclination to cooperate with federal prosecutors unless faced with a court order compelling them to do so. *See, e.g.*, GUIDELINES FOR LAW ENFORCEMENT AUTHORITIES, TWITTER, INC. (2017) ("Non-public information about Twitter users will not be released to law enforcement except in response to appropriate legal process such as a subpoena, court order, or other valid legal process."); LEGAL PROCESS FOR USER DATA REQUESTS FAQ, GOOGLE, INC. (2018), <https://support.google.com/transparencyreport/answer/7381738> [<https://perma.cc/9UVQ-X3ER>] (last visited Oct. 25, 2018) ("When we receive such a request, our team reviews the request to make sure it satisfies legal requirements and Google's policies. Generally speaking, for us to produce any data, the request must be made in writing, signed by an authorized official of the requesting agency and issued under an appropriate law. If we believe a request is overly broad, we'll seek to narrow it."); LEGAL PROCESS GUIDELINES FOR GOVERNMENT AND LAW ENFORCEMENT WITHIN THE UNITED STATES, APPLE, INC. (2017) ("For all requests from government and law enforcement agencies within the United States . . . Apple will only provide content in response to a search warrant issued upon a showing of probable cause In instances where Apple determines that there is no valid legal basis or where a request is considered to be unclear, inappropriate or over-broad Apple will challenge or reject the request.").

142. *See supra* text accompanying notes 39–51.

Constitutional Concerns

Rather than challenge the government's attempts to access customer data simply out of spite, technology companies like Microsoft have challenged such attempts on constitutional grounds.¹⁴³ Because federal law allows for virtually unlimited ninety day extensions at the discretion of the court, Microsoft, along with other technology companies, has argued that the absence of any set timeframe for holding customer data without informing the customer impedes Microsoft's ability to exercise its free speech right to inform its customers of actions affecting their private data, meaning the government is violating the First Amendment of the Constitution.¹⁴⁴ Further, Microsoft argues that because customers have no awareness of the request for their data, it can bring a challenge under the Fourth Amendment of the Constitution.¹⁴⁵ Microsoft has argued that such constitutional violations erode customer trust in Microsoft's services, making it sufficient to allow Microsoft to bring a claim on the customer's behalf.¹⁴⁶ Some technology companies that have used this constitutional argument have found their cases dismissed on procedural grounds.¹⁴⁷

Although a technology company has not yet directly challenged Georgia's law, it stands to be contested on the same grounds as previous challenges to the federal Electronic Communications Privacy Act. Such a challenge could harm how Georgia is viewed by technology companies seeking to operate within its borders. This concern is especially relevant in light of the legislature's recent public attempts to cater to technology companies.¹⁴⁸ To avoid such

143. See Joel Margolis, *Should a Service Provider Notify Customers When They Are Subject to Law Enforcement Investigations?*, SUBSENTIO (2018), <http://www.subsentio.com/service-provider-notify-customers-subject-law-enforcement-investigations/> [https://perma.cc/YX2H-4P7W].

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

This legal framework [holding that service providers cannot bring claims on behalf of their subscribers] was upheld in two recent cases involving LEA demands on Internet providers for subscriber information. One case in 2012 dismissed a Fourth Amendment motion by Twitter; the other denied a similar claim in 2015 by Facebook.

Id.

148. See, e.g., Richard Elliot, *State Leaders Update Amazon on Transit Expansion with Hopes to Win*

challenges, Georgia could consider limiting the timeframe that law enforcement is allowed to access consumer data without notification, instead of maintaining the currently open-ended language of the statute.

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HQ2, WSB-TV2 (June 19, 2018, 8:13 PM), <https://www.wsbtv.com/news/local/atlanta-leaders-hope-new-transit-changes-will-help-bring-amazon-hq2-to-the-city/773004394> [https://perma.cc/8FD3-LXFK].